be in lieu of all rules in the schedule to the Civil Practice Act, and of all other rules of this Court heretofore in force."

It thus appears that the procedure adopted by petitioner in following the Civil Practice Act and asking *"leave to appeal"* to the Illinois Supreme Court was not the proper practice as provided by law and the Supreme Court's denial of *"leave to appeal"* was not necessarily a refusal to review the judgment of the Appellate Court, or an indication that it would not so review it if its jurisdiction had been properly invoked.

Prior to January 1, 1934, the method of reviewing decisions of the Appellate Courts by the Supreme Court was controlled by the Practice Act of 1907. (Cahill's Illinois Revised Statutes, 1933, Appendix LVI.) This Act was repealed by Section 94 of the Civil Practice Act with the provision, however, that "nothing in this provision for repeal shall impair or affect any action or proceeding commenced before this Act shall have taken effect." (Chapter 110, Section 94, Cahill's Illinois Revised Statutes, 1933.)

Under the Practice Act of 1907 (Chapter 110, Section 120, Cahill's Illinois Revised Statutes, 1933, Appendix LXXVI), it is provided that the method of securing a review by the Supreme Court of a judgment of the Appellate Court shall be by the Supreme Court granting on application a writ of certiorari requiring the Appellate Court to certify the case to the Supreme Court for its review and determination.

No request was made by petitioner to the State Supreme Court that it grant its writ of certiorari in this case, and in the absence of such a request it cannot be contended that the exercise by the State Supreme Court of the discretion placed in it by the State laws has been invoked.

In the proceedings before the State Supreme Court this respondent called to the Court's attention, by its answer to petitioner's application for leave to appeal, the fact that there was no authority or legal basis for the procedure adopted by petitioner. It cannot therefore be presumed that the court's action was not prompted wholly by this fact and that if its discretionary power had been properly invoked it would not have granted the writ of certiorari, assumed jurisdiction, and determined the questions involved upon their merits.

For this court to assume jurisdiction it must affirmatively appear from the record that a decision could not be had in the highest State Court upon the federal question involved. *Mullen* v. *Western Springs Beef Co.*, 123 U. S. 116.

It is well settled by the decisions of this Court that it will review the final decision of the highest court of a state only when the Federal right claimed has been asserted in a manner calling for a decision by such highest court under its established system of practice and pleading.

Atlantic Coast Line Railroad Company v. *Mims*, 242 U. S. 532.

Hartford Life Ins. Co. v. *Johnson*, 249 U. S. 490.

In *Newman* v. *Gates*, 204 U. S. 89, a judgment was entered in the State trial Court against three persons. After judgment one of the judgment debtors died and the survivors appealed to the Appellate Court of the State without making the personal representative of the decedent a party thereto. The Appellate Court affirmed the judgment but the State Supreme Court on removal of the cause to that Court held that the appeal was defective because of failure to make the personal representative of the decedent a co-appellant, and dismissed the appeal without a determination upon the merits.

Upon a motion made in this Court to dismiss the writ of error under which the cause was brought here, this Court at page 95 said:

> "The removal of the cause from the Appellate Court into the Supreme Court of Indiana vacated the decision of the former tribunal, and after transfer the case stood in the highest court of Indiana as though it had been appealed to that court directly from the trial court. *Oster* v. *Broe*, 161 Ind. 114, 64 N. E. 918. Had the appeal been properly taken it would have been the duty of the Supreme Court of Indiana to pass upon the questions presented by the record before it, including, it may be, a Federal question, based upon the due faith and credit clause of the Constitution, which, on various occasions, was pressed upon the attention of the trial court. In legal effect, however, the case stands as though no appeal had been prosecuted from the judgment rendered by the trial court. As the jurisdiction of this court to review the judgments or decree of state courts when a Federal question is presented is limited to the review of a final judgment or decree, actually or constructively deciding such questions, when rendered by the highest court of a state in which a decision in the suit could be had, and as, for the want of a proper appeal, no final judgment or decree in such court has been rendered, it results that the statutory prerequisite for the exercise in this case of the reviewing power of this court is wanting.
>
> Writ of error dismissed."

C.

There is in the case at bar no substantial Federal question.

Petitioner cites on page 8 of his petition three cases involving national banks where the decisions of State Courts were reviewed by this Court, and urges that these cases are indicative that questions involving the powers and obligations of national banks under their charters are federal questions entitling the parties thereto to a review

in this Court. These cases were brought to this Court by writs of error at a time when the issuance of such writs was a matter of right. Since the amendment to the Judicial Code in 1916 such questions are now reviewable only when this Court has in the exercise of its discretion determined that they are substantial and of sufficient importance to warrant the review. We do not believe that there is here any such substantial federal question.

In this case the petitioner purchased and received from the respondent bank certain mortgage bonds for which he paid cash. In connection with this purchase the cashier of the bank gave to petitioner a written repurchase agreement dated November 1, 1929 (Rec., 3) in which, after acknowledging the sale of the bonds and the price received therefor, he stated as follows:

> "Should you desire to re-sell these bonds to us, we hereby agree to re-purchase same at maturity at par or $35,000.00 and accrued interest."

The only federal question involved in this case is whether this repurchase agreement is *ultra vires* as being in violation of the express provision of Section 5136 of the National Bank Act as amended in 1927, wherein after enumerating the powers granted to national banks, it is provided:

> "That the business of buying and selling investment securities shall hereafter be limited to buying and selling *without recourse* marketable obligations evidencing indebtedness of any person, co-partnership, association or corporation, in the form of bonds, notes and/or debentures commonly known as investment securities."

The question as to whether the repurchase agreement was in violation of the foregoing provision is not a substantial one and does not necessitate extended consideration for its determination. The meaning of the words

"without recourse" is clearly apparent. As is said in *Lyons* v. *Fitzpatrick*, 52 La. Ann. 697, 699:

> "Words are to be understood in their ordinary significance. 'No recourse' means no access to, no return, no coming back upon, no assumption of any liability whatsoever, no looking to the party using the term for any reimbursement in case of loss, or damage, or failure of consideration in that which was the cause, the motive, the object, of the undertaking or contract."

Petitioner by his affidavit of claim (Rec., 4) confined his cause of action and limited his recovery to the said written *ultra vires* agreement. In this affidavit made pursuant to Section 55 of Chapter 110 of the Illinois Practice Act of 1907 (Cahill's Illinois Revised Statutes, 1933, Appendix LXV), it is stated that plaintiff's claim was for money—

> "due and owing from the defendant to the plaintiff under its written agreement dated November 1, 1929."

It would seem, therefore, that the mere statement of the admitted facts would necessarily force the conclusion that petitioner's claim based as it is solely upon an *ultra vires* contract is of insufficient merit to invoke the jurisdiction of this Court.

D.

The decision of the State Court is in accord with the applicable decisions of this Court.

Texas & Pacific Railway Company v. *S. O. Pottorff*, 291 U. S. 245, is an applicable decision by this Court of issues similar to those involved in the pending case. That case involved the validity of a pledge of assets of a national bank to secure a private deposit. This court there held that national banks lack the power to make such a pledge because it is not conferred by Congress; that no estoppel

arose out of the obtaining of such a deposit by the pledge of assets, and that such *ultra vires* contract even though fully performed gave rise to no rights thereon and did not estop the bank from challenging the legality of the power exercised.

In *Cassatt, et al.*, v. *First National Bank of West New York*, 291 U. S. 660, this Court on January 15, 1934, denied a writ of certiorari to review the decision by the New Jersey Court of Errors and Appeals reported in 168 Atl. 585. That case involved the right of a national bank to purchase stock in another corporation and in that connection the New Jersey Court considered the 1927 Amendment to the National Bank Act. That court held against the power claimed and in is discussion of the issues gave attention to questions similar to the ones here involved. It held that it was a contradiction of terms to say that a national bank which has no power whatever under the law to purchase speculative securities directly, may, nevertheless, make itself liable as a purchaser by acting as an agent for a customer of the bank as such conclusion would nullify the purpose of the statutory limitation of its powers, which is to conserve the rights of its depositors and stockholders and enable it to perform unimpaired its functions as an agency of the federal government. It further held that persons dealing with national banks are charged with notice of the limitation of their powers.

In *Knass* v. *Madison and Kedzie State Bank*, 291 U. S. 660, this Court dismissed for want of a substantial federal question an appeal from the decision of the Supreme Court of Illinois reported in 354 Ill. 554, which decision together with the decision in *Texas, etc.*, v. *Pottorff*, 291 U. S. 245, were quoted by the Appellate Court of Illinois as sustaining its decision which it here seeks to review. The issues in the *Knass* case were almost identical with those in the case at bar.

The foregoing cases, all of very recent date, indicate clearly that the decision of the state court in the case at bar is in accord with the attitude of this Court.

II.

ULTRA VIRES.

The repurchase agreement was clearly ultra vires and in direct violation of the National Bank Act.

Respondent, a National Bank, had only the powers conferred upon it by the "National Bank Act" (5136 of the Revised Statutes). The powers conferred upon National Banks by Section 7 of this Act, so far as applicable here, are as follows:

> "*Seventh.* To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this title: *Provided, that the business of buying and selling investment securities shall hereafter be limited to buying and selling without recourse marketable obligations evidencing indebtedness of any person, copartnership, association, or corporation, in the form of bonds, notes and/or debentures, commonly known as investment securities.*"

The portion in italics was first added by the Act of Congress of February 25, 1927, amending said section.

It will be observed that the grant of powers to national banks by the above Act before its amendment was substantially the same as the grant of powers by the Banking Act of Illinois approved June 23, 1919, which was the subject

of construction by the Supreme Court of Illinois in the case of *Knass* v. *Madison and Kedzie Bank*, 354 Ill. 554.

It was there held by the Court that the term "general banking business" includes only such powers as are ordinarily conferred upon and used by banks such as loaning money, discounting notes, receiving deposits and dealing in commercial paper; and further that a repurchase agreement similar to the one involved in this case is not within the scope of a general banking business and is not within any of the powers conferred by the said State Banking Act, but is against public policy as it jeopardizes and impairs deposits and results in injury to depositors and the public.

The position taken by the Court in the *Knass* case has been reaffirmed in the recent case of *Hoffman* v. *Sears Community Bank*, 356 Ill. 598, where the Court stated that it adhered to the legal conclusions reached therein.

It follows that even without the amendment of 1927 the National Banking Act did not confer upon the national bank the power to enter into the repurchase agreement.

This interpretation was given to the National Bank Act by the Supreme Court of Minnesota in the case of *Greene* v. *First National Bank*, 172 Minn. 310, which was decided prior to the said amendment. In that case the Court said:

> "But a guaranty of commercial paper sold by a bank and a contract to repurchase real estate mortgages which the bank has sold stand on a different footing. As was said in *Eberlein* v. *Stockyards Mortg. & T. Co., supra*, to agree to repurchase on demand, and at face value securities the bank sells subjects it to a contingent liability, the sudden maturing of which, by the concurring demands of a large number of purchasers, may easily absorb its capital instantaneously. Paraphrasing the language of *Farmers' & M. Sav. Bank* v. *Crookston State Bank, supra*, it may be said that every bank is charged with duties to the public.

A bank is more than a mere private corporation for pecuniary profit. A national bank is under the supervision of the federal authorities. A contract to repurchase real estate mortgages which the bank has sold is in defiance of safe banking, tends to injure the depositors of the bank, and is contrary to public policy.

The power to contract for the repurchase of a loan secured by a real estate mortgage is not expressly conferred by the National Banking Act. Neither is it incidental to those expressly conferred. *California Nat. Bank* v. *Kennedy*, 167 U. S. 362, 371, 42 L. ed. 198, 202, 17 Sup. Ct. Rep. 831, is a case dealing with the acquisition by a national bank of stock in another corporation. It was held that such banks do not possess the power to deal in stocks, and that an implied prohibition against such dealings resulted from the failure of Congress to grant the power. That doctrine is applicable here. National banks are not expressly authorized to make such contracts as defendant is alleged to have made. The failure to grant the power negatives its existence, for the power is of such a nature that it is not to be inferred in the absence of language clearly indicating its existence."

In *Weckler* v. *First National Bank*, 42 Md. 585, which was a case where the plaintiff, Weckler, brought suit against the First National Bank to recover the sum of one thousand dollars paid to the bank for bonds of the Northern Pacific R. R. Company, alleging that the sale was procured by false, fraudulent and deceitful representations made by the bank's teller, the trial court instructed the jury that as the defendant was organized under the National Banking Act, the purchase and sale of bonds was not within its chartered powers and the plaintiff could not recover. The court of appeals after reviewing the powers of National Banks under the National Banking Act says, on page 595:

"We are, therefore, clearly of opinion that this business of selling bonds on commission, is not within the scope of the powers of the corporation, and the bank could not, under any circumstances, carry it on; and

being thus beyond its corporate powers, the defense of *ultra vires* is open to the appellee. 8 G. & J. 248. And it follows from this that the bank is not responsible for any false representations made by its teller to the appellant, by which she was induced to purchase the bonds in question. Hence there was no error in the Court's instruction to the jury nor in the rejection of the appellant's first and second prayers."

To the same effect are the following:

Hotchkin v. *Third National Bank of Syracuse*, 219 Mass. 234.

First National Bank of Allentown v. *Hoch* 89 Pa. State 324.

The amendment to the National Bank Act made in 1927 placed an express prohibition upon transactions such as are here involved. It specifically limits the purchase and sale of investment securities to *"buying and selling without recourse marketable obligations."*

It would seem that the foregoing provision sets forth plainly the limitations of a national bank in buying and selling bonds and other securities. "'No recourse' means no access to, no return, no coming back upon, no assumption of any liability whatsoever, no looking to the party using the term for any reimbursement in case of loss or damage, or failure of consideration in that which was the cause, the motive, the object of the undertaking or contract." *Lyons* v. *Fitzpatrick*, 52 La. Ann. 697, 699, 27 So. 110.

The provision of the National Bank Act above set forth is at least as comprehensive and far-reaching as the Illinois Statute on which the recent opinion of the Illinois Supreme Court in *Knass* v. *Madison & Kedzie State Bank* was based.

The limitation contained in this amendment to the National Bank Act prohibits such a transaction as is here involved even if it be construed to be a conditional sale as such a sale would not be "without recourse."

But the decision in the "Knass" case should be conclusive that the repurchase agreement here was not a conditi al sale. Here as in the "Knass" case the bank, by the terms of the written agreement, agreed to repurchase the bonds sold at a specified price. The agreement recites the payment of the purchase price in full by the purchaser, who is under no obligation to return the bonds or the interest received but may dispose of them as he sees fit. Title passed to the purchaser without any condition remaining to be discharged. Under these circumstances the Court held that the transaction was not a conditional sale.

It was the apparent intention of Congress in making the said amendment to the National Bank Act to prevent by an all inclusive provision the possibility of national banks incurring a contingent liability with reference to investment securities which they purchased or sold. The wisdom of this legislation cannot be doubted in the light of the recent rapid change in the value of securities, which has demonstrated that such contingent liabilities if extensively incurred would be disastrous to any bank. Against this contingent liability the bank is powerless to take necessary steps for its protection. The maturing of these agreements at or about the same time by a large number of purchasers may bring about the complete destruction of the banking institution and prevent the performance of its functions as an agency of the federal government. It may also cause a great loss to depositors and stockholders who rightfully rely upon government inspections and regulations for their protection.

In the face of this enactment by Congress, little weight should be given to the argument of counsel for petitioner that the said provision does not mean what it so clearly states in simple and easily understood language, or that notwithstanding such provisions the right to incur this con-

tingent liability is necessarily incident to the right to sell, and that while specifically prohibited, it is implicitly permitted by the National Bank Act.

Of the Illinois cases cited by petitioner at the bottom of page 14 and the top of page 15 of his brief, the first and last cases are the only ones involving questions of corporate power and have both been overruled by the *Knass* case, 354 Ill. 554. An application for the review of the *Knass* case by the United States Supreme Court was refused.

It is suggested by attorney for petitioner that there is a distinction between the *Knass* case and the case at bar in that the bank in the *Knass* case acted only as a broker and received as its profit from the transaction, the commission agreed upon for the sale of the securities. We do not understand these to be the facts. The Supreme Court of Illinois did point out in its opinion that the bonds were the obligations of the corporations that owned the real estate and signed the bonds and in that sense were NOT THE BONDS OF THE BANK. There is also reference made to the fact that the bank MAY have received a commission for them although there is nothing in the record to show that fact. However, the method pursued by banks in underwriting real estate loans is a matter of common knowledge, and the fact that the bank's service or profit for loaning its own money and selling the bonds is commonly referred to as a commission does not render any the less true the fact that the bonds were the property of the bank. Nor does it make any difference in the principle involved whether the bank underwrote a bond issue or purchased the bonds on the open market. The loss to the bank would be the same if it was forced to repurchase when the market value was as a result of economic conditions greatly below the stipulated repurchase price.

III.

ESTOPPEL.

A contract of a corporation which is ultra vires in the sense that it is beyond the powers conferred upon it by the legislature is not voidable only, but wholly void and of no legal effect and the corporation is not estopped from urging this defense.

Texas & Pacific Railway Company v. *S. O. Pottorff*, 291 U. S. 245.

Central Transportation Co. v. *Pullman Car Co.*, 139 U. S. 24-59.

California National Bank v. *Kennedy*, 167 U. S. 362.

First National Bank v. *Converse*, 200 U. S. 425-439.

Merchants National Bank v. *Wehrman*, 202 U. S. 295.

De La Vergne Refrigerating M. Co. v. *German Savings Institution*, 175 U. S. 40-58.

First National Bank v. *Hawkins*, 174 U. S. 364-369.

National Home Building and Loan Assn. v. *The Home Savings Bank, et al.*, 181 Ill. 35-43.

Durkee v. *The People*, 155 Ill. 354.

Farson v. *Fogg*, 205 Ill. 326.

Steele v. *Fraternity Tribunes*, 215 Ill. 190.

Stacey v. *Glen Ellyn Hotel & Springs Co.*, 223 Ill. 546.

Converse v. *Emerson T. & Co.*, 242 Ill. 619.

Fritz v. *Equitable B. & L. Co.*, 186 Ill. 183, 198.

Best Brewing Co. v. *Klassen*, 185 Ill. 37.

Knass v. *Madison & Kedzie State Bank*, 354 Ill. 554.

In the recent decision of this Court in the case of *Texas & Pacific Railway Co.* v. *Pottorff*, 291 U. S. 245, involving the *ultra vires* acts of a National Bank in pledging assets to secure a private deposit, the Court at page 260 says:

> "It is the settled doctrine of this Court that no rights arise on an *ultra vires* contract, even though the contract has been performed; and that this conclusion cannot be circumvented by erecting an estoppel which would prevent challenging the legality of a power exercised."

Perhaps the most frequently quoted statement of this rule which has been consistently followed by this Court and by the Supreme Court of Illinois is from *Central Transportation Company* v. *Pullman's Palace Car Company*, 139 U. S. 24, pages 59, 60 and 61, and is as follows:

> "The view which this court has taken of the question presented by this branch of the case, and the only view which appears to us consistent with legal principles, is as follows:
>
> A contract of a corporation, which is *ultra vires*, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it.
>
> When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation, nor the other

party to the contract, can be estopped, by assenting to it, or by acting upon it, to show that it was prohibited by those laws."

IV.

IMPLIED ASSUMPSIT.

Petitioner was limited by his affidavit of claim to a recovery upon the repurchase agreement alone and the question of recovery on an implied promise was not an issue in the case.

It is claimed by petitioner that even though the repurchase agreement is void, he is nevertheless entitled to recover the purchase price paid for the bonds and this apparently without a return of the bonds and at a time long distant from the time of purchase and after investment securities of all kinds have greatly declined in value.

Petitioner has cited in this connection a number of cases involving questions of unjust enrichment; cases where a corporation obtained money or property on its own void obligation alone. In such cases the courts have indicated that a recovery may be had upon the implied promise to pay for benefits received. These cases are different from the pending case where the bonds were not the obligations of the defendant bank but of another corporation, which were purchased by the bank and sold to the plaintiff. There is no allegation that they were sold at a profit. However, a detailed consideration of the cases cited is unnecessary as plaintiff in the case at bar based his right of recovery solely upon the repurchase agreement and its enforcement as a valid agreement. (See Appellate Court Opinion, Rec., 50.)

Plaintiff, with its declaration, filed an affidavit of claim (Rec., 4) in which he stated that his claim was for money—

"due and owing from the defendant to the plaintiff under its written agreement dated November 1st, 1929."

Defendant by its plea and affidavit of merits set up its defense that the alleged contract was *ultra vires* and void.

The Illinois courts have interpreted the provisions of Section 55 of the 1907 Practice Act, Ch. 110, as limiting the issues made by the pleadings to only those that are supported by the respective affidavits of the parties.

In *Firestone Tire Company* v. *Ginsburg*, 285 Ill. 132, the Court, by Mr. Justice Cartwright, at page 136, says:

> "Another ground alleged for affirming the judgment is that the pleas answered only the special counts of the declaration on the notes, and there being no plea on file to the common counts the judgment can be sustained upon that ground. The notes were admissible in evidence under the common counts, but the affidavit of claim made by the plaintiff showed that the action was on the notes and stated the amount due thereon, and the bill of exceptions shows that the notes were the basis of the judgment. There was no affidavit of any claim based on the common counts although the notes would be admissible under them, and the plaintiff's action was without any affidavit of claim except upon the promissory notes. The plaintiff was required to state in its affidavit the nature of its demand, and having stated it, all that was required of the defendant was to meet that statement by his affidavit."

So in the case of *Grant Keime* v. *Frank Thum, et al.*, 238 Ill. App. 519, it was held that there could be no recovery under the common counts on an implied contract where the affidavit of claim set up an express contract, and in that case the Court at page 522 says:

> "The consolidated common counts were filed, stating in nine different, general and indefinite forms the demand of the plaintiff. But the affidavit of plaintiff's claim eliminated all counts except that for 'goods, chat-

tels and effects before that time sold and delivered by plaintiff to defendants at their request.' That count was by affidavit rendered certain and definite in all the terms authorizing a recovery. By it the quantity of corn sold and delivered, the price per bushel, and the express agreement of defendants to pay the price, were explicitly stated, and the amount due under those terms. Under the elementary principles of procedure he could recover only upon proof of those terms by a preponderance of the evidence if challenged, as they were, by an appropriate plea supported by an affidavit of merits of the defense stated in the plea. *Reddig* v. *Looney*, 208 Ill. App. 413. Upon this state of the record the parties went to the jury."

Other cases holding that recovery and proof are limited to the affidavit of claim are as follows:

In *Goddard Tool Co.* v. *Crown Electrical Mfg. Co.*, 219 Ill. App. 34, in the opinion by Mr. Justice Heard, it is said:

"We have set forth the affidavits of claim and of merits in so much detail for the reason that by section 55 of chapter 110, Rev. Stats. of Illinois (I. & A. 8592), the respective parties are limited in their evidence to the matters controverted by the affidavits. *Reddig* v. *Looney*, 208 Ill. App. 413; *Miller* v. *Thomas*, 200 Ill. App. 125."

George W. Reddig, et al., v. *John Looney*, 208 Ill. App. 413 (on pp. 419, 420):

"The rule above stated will not result in trying cases on issues formed by an affidavit of claim and an affidavit of merits. Though actions at law in the Circuit Court are to be tried upon the pleadings, yet under this statute the parties are limited also by their affidavit. Plaintiff can prove and recover only what is stated in his affidavit of claim, but he cannot prove and recover even that unless he has an appropriate declaration on that cause of action. Defendant can only prove such defense as is stated in his affidavit of merits, but he cannot prove that or have a verdict upon that unless he has a pleading appropriate to that defense. The proof and the verdict must be under proper pleadings, but

no proof can be admitted or availed of under the pleadings unless it is supported by a proper affidavit."

This case (*Reddig* v. *Looney*) is cited with approval in an opinion of the Appellate Court of the first district in which all the authorities are reviewed. In this case, *Theron P. Cooper* v. *John A. Anderson*, 246 Ill. App. 1, the Court, on page 11, referring to said Section 55, says:

> "It is true that the affidavits do not take the place of the pleading, but the evidence to be offered and the issues to be tried are limited to the issues as made by the pleas as verified by the affidavits."

The record does not present to this Court any question as to the right of petitioner to maintain any action independently of the contract. Under like circumstances the Courts have refused consideration of this question.

In *Mercantile Trust Co.* v. *Kastor*, 273 Ill. 332, a similar situation existed and the Court after discussing the rule governing recovery on an implied contract for benefits received said at page 344:

> "This suit is brought against the defendant in error, however, upon his guaranty of the unlawful contract and not upon the implied contract. The trial court erred in instructing the jury. It should have given the instruction to find the verdict for defendant."

In *Hoffman* v. *Sears Community Bank*, 356 Ill. 598, the cause of action was based solely upon a repurchase agreement and a recovery by plaintiff below was reversed, and judgment given by the Supreme Court for defendant for costs.

In the *"Knass"* case, 354 Ill. 554, the Court refused the specific performance of a similar repurchase agreement and as the bill was based solely upon the void contract, it was ordered that the judgments of the lower courts be

reversed and the cause remanded with directions to dismiss complainant's bill for want of equity.

In *Central Transportation Company* v. *Pullman's Palace Car Company*, 139 U. S. 24, the Court at page 61, says:

> "Whether this plaintiff could maintain any action against this defendant, in the nature of a *quantum meruit*, or otherwise, independently of the contract, need not be considered, because it is not presented by this record, and has not been argued. This action, according to the declaration and the evidence, was brought and prosecuted for the single purpose of recovering sums which the defendant had agreed to pay by the unlawful contract, and which, for the reasons and upon the authorities above stated, the defendant is not liable for."

In *De La Vergne Refrigerating M. Company* v. *German Savings Institution*, 175 U. S. 40, the Court after holding that the contract involved was *ultra vires*, said on page 59:

> "As the action in this case *is upon the contract* and as the contract is prohibited by the charter of the refrigerating company there can be no recovery on it."

CONCLUSION.

We have shown that this Court is without jurisdiction to issue the writ of certiorari herein because the discretion of the Supreme Court of Illinois as to whether it should review the judgment of the Appellate Court was never properly invoked, and because there is in the record no affirmative showing as to method by which it was sought to invoke such discretion. We have also shown that the federal question involved is not a substantial one and that the decision thereof by the state court is in accord with the applicable decisions of this Court. The repurchase agreement of November 1, 1929, is clearly *ultra vires* and against

public policy and is not barred as a defense by the doctrine of estoppel.

The record does not present the question as to whether there can be a recovery independently of the contract.

We therefore ask that petitioner's prayer for the issuance of the writ of certiorari be denied.

Respectfully submitted,

DANIEL M. HEALY,
Attorney for Respondent.